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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/765,675	01/22/2001	Veronique Douin	05725.0830	6349

22852 7590 06/26/2002

FINNEGAN, HENDERSON, FARABOW, GARRETT &  
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WASHINGTON, DC 20005

EXAMINER

YU, GINA C

ART UNIT	PAPER NUMBER
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1617

DATE MAILED: 06/26/2002

11

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action**

Application No.

09/765,675

Applicant(s)

DOUIN ET AL.

Examiner

Gina C. Yu

Art Unit

1617

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 30 May 2002 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

**PERIOD FOR REPLY** [check either a) or b)]

- a) ☒ The period for reply expires 6 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
  - (b) ☐ they raise the issue of new matter (see Note below);
  - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
  - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_.

3. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
4. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See the next page.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: None.Claim(s) objected to: None.Claim(s) rejected: 1-83.Claim(s) withdrawn from consideration: None.

8. ☐ The proposed drawing correction filed on \_\_\_\_\_ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.
10. ☐ Other: \_\_\_\_\_

**RUSSELL TRAVERS**  
**PRIMARY EXAMINER**  
**GROUP 1200**

Applicants' request for reconsideration filed on May 30, 2002, has been fully considered but are not persuasive. The rejections are maintained for the reasons of record as indicated in the final rejection dated February 12, 2002.

Applicants argue that "combining Ziegler's entire combination with the compositions of Restle" would not render the claimed invention obvious. It must be noted that the examiner's rejection is based on the proposal that modifying the composition in Restle by adding the skin-conditioning ingredient taught in Ziegler would have been obvious to a skilled artisan, and not by adding the entire composition of the secondary reference. While applicants further argue that Ziegler is inapplicable since the invention therein is micro-emulsions and not nano-emulsion, this argument is not persuasive. Restle teaches that a nano-emulsion is formed by specific nonionic surfactant emulsifiers. A skilled artisan would have expected that a skin-conditioning cationic polymers used in one type of cosmetic composition would still provide the same beneficial properties in other type of composition, unless proven otherwise. Applicants provide no support why it would be unexpected or nonobvious to employ in the nano-emulsion cosmetic composition a skin-conditioning component used in other types of emulsion composition.

Applicants further argue that the proposed combination of Restle and Zielger is based on a guesswork, or "obvious to try" standard. Examiner respectfully disagrees, as it is evidenced by Ziegler that the cationic polymers applicants use is well known cosmetic component as a moisturizing ingredient.

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In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In this case, the motivation to use the cationic polymers for its known beneficial cosmetic properties are provided by the prior arts alone and not by applicants' disclosure. Examiner maintains that the rejections are proper.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gina C. Yu whose telephone number is 703-308-3951.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Minna Moezie can be reached on 703-308-4612. The fax phone numbers for the organization where this application or proceeding is assigned are 703-308-4242 for regular communications and 703-308-4242 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1234.

Gina C. Yu  
Patent Examiner  
June 18, 2002

RUSSELL TRAVERS  
PRIMARY EXAMINER  
GROUP 1200